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In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,
Petitioners

v.

SYLVIA BURWELL, *et al.*,
Respondents.

[Additional Case Captions Listed Inside Front Cover]

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth & D.C. Circuits.

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA,

in support of the *Petitioners and supporting reversal.*

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PRIESTS FOR LIFE, *et al.*, *Petitioners*,
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, *Respondents*.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*, *Petitioners*,
v.
SYLVIA BURWELL, *et al.*, *Respondents*.

EAST TEXAS BAPTIST UNIVERSITY, *et al.*, *Petitioners*,
v.
SYLVIA BURWELL, *et al.*, *Respondents*.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*, *Petitioners*,
v.
SYLVIA BURWELL, *et al.*, *Respondents*.

SOUTHERN NAZARENE UNIVERSITY, *et al.*, *Petitioners*,
v.
SYLVIA BURWELL, et al., *Respondents*.

GENEVA COLLEGE, *Petitioner*,
v.
SYLVIA BURWELL, *et al.*, *Respondents*.

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INTEREST OF *AMICUS CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States with members from all 50 states. Through our grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise their religious freedoms as protected by the Religious Freedom Restoration Act ("RFRA").

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[1] All Petitioners and Respondents have consented to the filing of this Brief. The letters of consent from Counsel for the Petitioners and the Respondents have been lodged with this Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

SUMMARY OF THE ARGUMENT

Women have a long history of recognizing the deep value of religious freedom and charitable service. The contribution of so many women of faith to the poor and needy, through religious ministry, in our country cannot be overestimated. Those contributions are a direct expression of faith that is protected by RFRA. The federal government infringes on that freedom today through a regulatory scheme under the Patient Protection and Affordable Care Act (ACA)[2] that requires that all employers providing private insurance plans to "provide coverage for and not impose any cost sharing requirements for preventive care and screenings" for women that includes medicines and procedures that come in direct violation of deeply held religious beliefs of many women. Even though the government recognizes the religious freedom implications, it fails to provide adequate accommodation via a true exemption.

The choice the government presents between violating deeply held religious beliefs or facing crippling fines that would prevent the expression of religious faith through ministry services is no choice at all and presents a most basic violation of the free exercise of religion.

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[2] Pub. L. No. 111–148, 124 Stat. 119 (2010).

ARGUMENT

As an organization representing the interest of a significant group of women, *Amicus* finds it offensive that some requirements in the Patient Protection and Affordable Care Act (ACA)[3] ("the Mandate") are being used to infringe the religious liberties of women, while purporting to act for the benefit of women. In relevant part, the ACA requires the following:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for
>
> with respect to women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by the Health Resources and Services Administration

42 U.S.C. § 300gg-13(a). Those guidelines have been interpreted to include all FDA-approved contraceptive and sterilization methods, including abortifacients such as Plan B and Ella, and intrauterine devices,[4] which millions of religious

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[3] *Id.*

[4] 77 Fed.Reg. 8725 (Feb. 15, 2012).

women consider an affront to the sanctity of human life. Noncompliance with these regulations is met with steep penalties.[5] The government's supposed "accommodation," through the Employee Benefit Security Administration's (EBSA) form 700,[6] fails to address the religious freedom implications involved in this manner, but merely shifts them, while still burdening women of faith.

Though this Mandate has been promoted as benefiting women, it cannot escape this Court's attention that many *women* are also represented by Petitioners who merely seek to protect against this violation of their constitutional guarantee of the free exercise of religion. For example, as explained by Petitioners in their Brief, Petitioner GuideStone was created by the Southern Baptist Convention. E. Texas Baptist U., et al Br. iii, 27. The Convention's *16+ million* members[7]—including, of course, its women members—vigorously oppose abortion. *Id.* at 7-8. Furthermore, GuideStone, whose only member is the Southern Baptist Association, E. Texas Baptist U., et al Br. iii, 27, has women in its leadership and

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[5] *See* 26 U.S.C. § 4980D(a), (b)(1) and § 4980H(a), (c).

[6] Employee Benefit Security Administration Form 700 is available, through the United States Department of Labor, at http://www.dol.gov/ebsa/pdf/preventiveservices eligibleorganizationcertificationform.pdf (last vis-ited Jan. 9, 2016).

[7] *Fast Facts About American Religion*, Hartford Institute for Religion Research, http://hirr.hartsem.edu/research /fastfacts/fast_facts.html#largest (figures as of 2012) (last visited Jan. 8, 2016).

on its staff. *See, e.g.*, http://www.guidestone.org/AboutUs/GuideStoneLeadership. This pattern is perhaps even more dramatically demonstrated by the various Catholic diocesan Petitioners and their associated schools, agencies, and leaders, with their—as of 2010—worldwide membership of nearly *1.1 billion* and United States membership of 75.4 million, [8] although it could be demonstrated by looking at any of the Petitioners.

This is so because the point is not just that the Catholic Church or the Southern Baptist Convention or the other Protestant denominations represented by various Petitioners have innumerable women *within their denominations*. Rather, *every single* non-diocesan, non-denominational Petitioner—just as GuideStone—has women among *their* students and faculty (where applicable), and/or *their* leadership, *their* staff or both.[9]

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[8] http://www.pewforum.org/2013/02/13/the-global-catholic-population (last visited Jan. 8, 2016).

[9] These facts are readily verifiable by perusing the various Petitioners' websites. To be precise, the Most Reverend David A. Zubick and the Most Reverend Lawrence T. Persico, and Father Frank Pavone are obviously men, but the first two serve as Plaintiffs/Petitioners in their capacities as bishops of their dioceses and Father Pavone serves as an officer of Priests for Life (about which see the next textual paragraph). To be further precise, Erie Catholic Preparatory School is actually composed of an all-male school and an all-female school, which, of course, is the part of the entity that has female students. *See*, http://www.prep-villa.com (last visited Jan. 8, 2016).

This is even true—perhaps counterintuitively, and perhaps at the opposite end of the spectrum from the Little Sisters of the Poor—for Petitioners Christian Brothers Services, Christian Brothers Employee benefit Trust, and Priests for Life.[10] These organizations have many women in key leadership and staff roles, as can be seen by perusing their websites. Indeed, two of the key leaders of Priests for Life—Alveda King and Janet Morana—are named Plaintiffs/Petitioners in this case.

Amicus, Concerned Women for America, representing 500,000 women around the country, stand boldly with these women—both at the denominational and at the institution-specific level—against this affront to one of our most cherished constitutional rights in the name of "women's rights."

I. WOMEN VALUE RELIGIOUS FREEDOM, MINISTRY, AND SERVICE.

Women have a long history of fighting for religious liberty and of providing ministry and services as part of the free exercise of their religion for which they have fought. Yet, these efforts all too often fall into the category of being "not religious enough" or of being a "junior varsity" free religious exercise (see next paragraph). This pejorative two-tier view of free religious exercise has been enshrined

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[10] Numerous pages showing women leaders and staff can be found by starting at https://www.cbservices.org and www.priestsforlife.org (last visited Jan. 8, 2016).

in the ACA—whether deliberately or inadvertently. Although Plaintiffs/Petitioners also represent many men, CWA finds it offensive—and so should this Court—that the predominately male Congress that passed the ACA[11] thought it appropriate to treat women monolithically, assuming that in the name of "women's healthcare," it could speak for all women. This is especially egregious given that women have historically exercised their religion in ways that were often counter-cultural, often low-key and service-oriented, and often both.

As the *Zubik* Petitioners point out, "[a]ll of the activities described —worship, education, charity, and advocacy—are carried out by Petitioners as part of the exercise of their faith." Yet these activities—so often carried out by women—are considered a "junior varsity" free exercise of religion. *See Zubik*, et al. Br. 9 (quoting Joint App'x 508-09, 721-22). As the *Zubik* Petitioners also point out, the government and its Mandate, "act[ ]as if religious organizations such as the Catholic Church have a 'religious' wing and a 'charitable/educational' wing, when in fact they are all equally intrinsic to the exercise of the Catholic religion." *Id.* at 55.

This indictment is especially relevant because

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[11] Of the 535 Senators and Representatives in the 11th Congress, 91 (17%), were women. See, http://www.infoplease.com/us/government/111-congress-women.html (compiling official Senate and House figures). Your *Amicus* has adjusted for eliminating non-voting Delegates.

the Catholic Church *and* many of the Protestant denominations represented in this litigation—Baptists, Nazarenes, Reformed denominations—limit certain leadership roles to men, but allow women to engage in various other forms of ministry. Such charity, service, and education must not be relegated to "junior varsity" status.

Or as the Dissent put it in *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 401-02 (3d Cir. 2013) rev'd and remanded *sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), the Government hasn't the "competence to decide who is religious enough to qualify as a 'religious organization '" Yet that is what the government has done with the ACA with regard to historically woman-predominated free exercise and social services.

For example, the Anne Hutchinson Memorial at the Massachusetts State House stands as a reminder of a time in our history when women could be marginalized because of their deeply held religious views. It is sad that the government's actions in this case remind us of that history. Hutchinson was tried and banished from the Massachusetts Bay Colony in 1637 because of her religious views.[12] The inscription in the marble foundation of her monument reads in part: "In Memory of Anne Marbury Hutchinson

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[12] Melina Mangal, *Anne Hutchinson: Religious Reformer* 7, Capstone Press (2004).

Courageous Exponent of Civil Liberty and Religious Toleration."[13] She was punished for her religious beliefs then, and ironically, today the government threatens a different punishment, but a punishment nonetheless, to women involved in ministry service if they faithfully adhere to their religious beliefs.

St. Elizabeth Ann Seton, the first person born in the United States to become a canonized as a saint (September 14, 1975), also had to stand by her religious convictions in a less than free environment.[14] Biographer Julie Walters recounts a time when Anti-Catholic mobs would stand outside the doors of the church yelling things like, "We're going to burn this unholy place to the ground."[15] But Seaton overcame all that and went on to found the Sisters of the Charity of St. Joseph's, the first new community for religious women in the United States. She began the first free Catholic school for girls in the United States, St. Joseph's Academy and Free School, [16] and her lifetime commitment to charity is

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[13] Pictures and description *available at* http://www.dcmemorials.com/index_indiv0008064.htm (last visited Jan. 26, 2014).

[14] *Biograpy of St. Elizabeth Ann Seton*, The National Shrine of Saint Elizabeth Ann Seton, *available at* http://www.setonheritage.org/learn-and-explore/resources/mother-seton-bio/early-life/ (last visited Jan. 9, 2016).

[15] Julie Waters, *Elizabeth Ann Seton: Saint for a New Nation* 71, Paulist Press (2002).

[16] *Biography of St. Elizabeth Ann Seton, available at* The National Shrine of Saint Elizabeth Ann Seton, http://www.setonheritage.org/learn-and-explore/resources/

still celebrated today.

These stories are a reminder of that highest of principles enshrined in our great Constitution, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. This Court should not lose sight that it is religion—faith—that fueled these women's passion for ministry service. It was faith that fueled Evangeline Booth (1865–1950), daughter of Salvation Army founders William and Catherine Booth. She became commander of the Salvation Army in America and the first general of the International Salvation Army. [17] All the incredible charitable work done by the Salvation Army throughout the years is "rooted in the faith of its members."[18]

Those are just a few names, but many more exist. Women like Isabella Graham who established the Society for the Relief of Poor Widows With Small Children[19] and Phoebe Palmer who founded the Five

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mother-seton-bio/ (last visited Jan. 9, 2016).

[17] Edward T. James, Janet Wilson James, Paul S. Boyer, eds. *Notable American Women, 1607-1950: A Biographical Dictionary,* Vol. 2, 206, Harvard University Press (1971).

[18] Salvation Army International Statement on Faith, *available at* http://www.salvationarmy.org/ihq/faith (last visited Jan. 9, 2016).

[19] Dorothy A. Mays, *Women in Early America: Struggle, Survival, and Freedom in a New World* 165, ABC-CLIO, Inc. (2004).

Point Mission to provide for the needy.[20] That same spirit of faith and charity motivates Petitioners to do what they do today.

The government's actions in this case threaten to stifle the historical tradition of religious expression through ministry and charity by imposing a substantial and unnecessary burden on the Petitioners' ability to serve their neighbors. The government is prepared to force them to abandon their religious calling if they are not willing to do what their consciences prohibit them to do. If this Court does not guard freedom in this most intimate of areas, between a man or woman and his or her God, could just as easily be at risk of losing their freedoms in any number of other areas that are perhaps cherished more by other groups.

Women are not a monolithic group of people placing similar values in all areas of life, including faith or reproductive rights. But they should all be treated equally and with respect and dignity. The government distorts the facts when it argues that it is acting on behalf of "women" by imposing this Mandate. *Amicus* urges this Court to reject any urgency to simplify the values of women by taking the singular view of a few and imposing it by force of law on all.

Thirty-seven years ago, Beverly LaHaye founded Concerned Women for America (CWA) precisely for this reason. She wanted to make sure

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[20] Richard Wheatle, *The Life and Letters of Mrs. Phoebe Palmer* 224, W.C. Palmer, Jr. (1876).

women of faith had a voice in legal and public matters where she felt a particular view was being presented consistently as the views of all women. Today CWA enjoys wide support, having become a powerful voice on behalf of women of faith all over the nation. Throughout the years, CWA has stood in representation of women's religious liberties in the culture, legislatures and the courts.[21] In a similar way, *Amicus* comes before this Court today asking that the views of women of faith not be made subservient to the views of other groups of women who may not share our values.

II. RELIGIOUS MINISTRY WORK, SUCH AS CHARITY AND EDUCATION, IS AN EXPRESSION OF FAITH PROTECTED BY RFRA.

The government recognizes that there is a significant infringement upon religious liberties with the Mandate. The existence of a "true" exemption, without the burden of authorizing a third party through EBSA form 700, which the government has made available to churches and "integrated auxiliaries" proves that. *See* 78 Fed. Reg. 39874; 45

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[21] *See, e.g., Concerned Women for America Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) as an example, where the court held the use of public library by women's religious group would not violate the establishment clause; *see also Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, (2nd 1991).

C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). Why does the government insist on denying that same protection to other religious institutions? Its argument on this issue, as has been noted, amounts to saying that Petitioners are not "religious enough" to warrant a true religious exemption. But such an assertion is false. Petitioners' commitment to their faith is as great as that of any exempted church or auxiliary. All these ministries—exempted and non-exempted—are united by the Great Commission[22] and contribute to it by adhering to the tenet of their faith to "love your neighbor as yourself"[23] in different ways.

But even beyond that, it is not the government's role to second-guess religious organizations as to their religious practices. The government engages in an unconstitutional revisionism of what religious expression is supposed to look like. The government's failure to comprehend the strong religious beliefs at issue here should not provide cover for its infringement on Petitioners free exercise of religion or a ground to question the severity of its infringement. It views education and service to the next generations, which is crucial to the Christian faith, as a lesser form of religious work. As this Court opined recently in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), when the government insists it can speak to such issues, it

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[22] *See* Matthew 28:16-20, Mark 16:14-18, Luke 24:44-49.

[23] Matthew 22:39; *see also*, Mark 12:31.

"infringes the Free Exercise Clause [and RFRA], which protects a religious group's right to shape its own faith and mission "

For many Christians, service to their neighbors is perhaps the highest form of worship, and for the state to second-guess those beliefs is as big an offense to the basic principles of RFRA as could ever occur. This Court has opined that "beliefs rooted in religion are protected by the Free Exercise Clause [and now RFRA], which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 713 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972)). This Court wrote that, "determination of what is a 'religious' belief or practice. is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [RFRA] protection." *Thomas* 450 U.S. at 714. Yet that is exactly what the government is doing and asks this Court to do in this instance. The government substitutes its perception of Petitioners' deeply held religious beliefs and makes demands it considers reasonable based on its own assumptions.

CONCLUSION

Petitioners should qualify for a full religious exemption, as do churches and "integrated auxiliaries," from the provisions imposed in 42 U.S.C. § 300gg-13(a). For the government to use the

force of law to obligate Petitioners to violate their consciences is a gross violation of the constitutional right to the free exercise of religion protected by RFRA. The government's failure to grasp, or its willingness to second-guess, the degree to which it burdens Petitioners should provide no safeguard to its gross violation of constitutional rights. The consequences of such a burden on women of faith especially are of grave concern to *Amicus*, considering our country's rich history of women of faith serving through ministry and charitable service. For the foregoing reasons, we respectfully ask this Court to affirm to reverse the courts below and to grant Petitioners an exemption from complying with the Mandate

Respectfully submitted,
this 11th day of January, 2016,

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